Musk himself replied to his tweet several times, garnering thousands more likes and re-tweets. (GCX 69) Numerous media outlets, including the Mercury News and Bloomberg, reported on and republished Musk's stock option tweet. (RX 45)

III

ARGUMENT

A. TESLA'S CONFIDENTIALITY POLICY UNLAWFULLY DENIES EMPLOYEES THEIR RIGHT TO SHARE INFORMATION ABOUT THEIR WORKING CONDITIONS WITH EACH OTHER, THEIR UNION AND THE MEDIA [SAC ¶ 7(a)]

Tesla's initial response to the Union's organizing drive, coming two months after the Voluntary Organizing Committee went public, was to adopt a policy that barred virtually all communications by employees about their terms and conditions of employment with anyone outside Tesla. It did this by classifying all "information about…employees" as confidential information and banning its employees from writing about such supposedly confidential information or discussing it with anyone outside Tesla.

This is flatly illegal. Employees have the right under Section 7 of the National Labor Relations Act to share information about their working conditions. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 (1945). This protection includes employee communications about working conditions with third parties, such as a union representative, the media, or the public. *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 231 (1980); *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007). Employees do not "lose their protection under the 'mutual aid or protection' clause [of Section 7 of the Act] when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

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1. Tesla's Confidentiality Acknowledgement Explicitly Restricts Employees' Section 7 Rights

The Board has, in fact, found confidentiality policies similar to Tesla's Confidentiality Acknowledgment to be unlawful restrictions on employees' Section 7 rights. In *IRIS, USA, Inc.*, 336 NLRB 1013, 1018 (2001), the employer maintained a confidentiality policy stating "[a]ll of the information, whether about IRIS, its customers, suppliers, or employees is strictly confidential." *Id.* The Board found this rule on its face violated Section 8(a)(1) because it "specifically instructs employees to keep information about employees 'strictly confidential.'" *Id.* *See also, Double Eagle Hotel & Casino*, 341 NLRB 112, 114-15 (2004) (finding Section 7 activity was expressly restricted by a rule stating: "You are not, under any circumstances permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any nonemployee without approval from the General Manager or the President"). The language in Tesla's Confidentiality Acknowledgment matches the language found to restrict Section 7 activity on its face in *IRIS* and *Double Eagle*.

The National Labor Relations Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017) supports this analysis. In this case, the Board created a new standard for "facially neutral employment policies, work rules and handbook provisions" and overruled the previous "reasonably construe" standard, as expressed in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). However, *Boeing* maintained the first step of *Lutheran Heritage,* stating that the Board's inquiry begins "with the issue of whether the rule explicitly restricts activities protected by Section 7." *Boeing*, 365 NLRB No. 154, *1. If it does, the Board will "find the rule unlawful." *Id.* Such is the case here.

Five distinct parts of the Confidentiality Acknowledgment explicitly restrict Section 7 activity on their face. (GCX 31-003, RX 11, RX 12, RX 14) First, the second paragraph explicitly makes "information about...employees" and everything you "learn about, or observe in your work about Tesla" confidential. This language plainly covers working conditions, yet no exception is provided to allow for lawful activity.

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Second, the final sentence of the second paragraph states "it is never OK to communicate with the media or someone closely associated with the Media about Tesla, unless you have been specifically authorized in writing to do so." This rule does not even limit itself to confidential information. The rule instead covers talking to the media about *any* aspect of Tesla, necessarily including working conditions. The rule is therefore not "facially neutral" but expressly restricts Section 7 activity.

Third, the Acknowledgement's third paragraph states "you must not, for example, discuss confidential information with anyone outside Tesla." Because confidential information is defined in the second paragraph to include working conditions, this broad prohibition prevents employees from speaking to a union representative about salary and benefits information, or speaking to the public about the dangerous workplace safety problems that Ortiz, Moran and other Tesla employees have observed.

Similarly, the third paragraph also prohibits "writing about your work in any social media, blog, or book." Again, this prohibition contains no exception to permit employees to discuss their working conditions or their efforts to improve them with each other or with others outside Tesla. The rule thus explicitly prevents Tesla employees from writing publicly about working conditions, a blatant violation of the Act.

Finally, the fourth paragraph of the Confidentiality Acknowledgment threatens discipline—up to and including termination—for employees who violate the Acknowledgment. It further threatens criminal charges and liability for "harm and damage" that the Company believes occurred as a result of an employee's breach of the policy. Once again, this part makes no exception for communications about employees' terms and conditions of employment or their Section 7 activity. Without such an exception, the language can only be interpreted as an express threat of adverse action if an employee engages in protected concerted activity.

2. Tesla Issued the Confidentiality Acknowledgement In Response to Employees' Union Organizing Campaign

The Confidentiality Acknowledgement not only explicitly restricts protected activity, but also was issued in response to employees' organizing efforts. Under this second, wholly distinct

theory, the Confidentiality Acknowledgment violates Section 8(a)(1) because Tesla purposely discriminated against employees' protected activity by issuing the Acknowledgment.

Under the NLRA, "an employer's promulgation of a new rule upon the commencement of a union organizational campaign is strong evidence of discriminatory intent." *Gallup, Inc.,* 334 NLRB 366, 366 (2001) (violation found where employer issued new rules "immediately after discovering the Union's organizing efforts"); *Cannondale Corp.,* 310 NLRB 845, 849 (1993) (violation found where "the timing of the promulgation of the rule was closely related to the union campaign which began shortly before"); *see Advancepierre Foods, Inc.*, 366 NLRB No. 133, fn 4 (2018) (noting that *Boeing* overruled the "reasonably construe" prong of *Lutheran Heritage* but not the "promulgated in response to union activity" prong).

In September of 2016, the union organizing campaign launched a public Facebook page called "A Fair Future at Tesla." This constitutes the first ever notice the Company received that a union organizing campaign existed at the Fremont facility. Soon after, in October and November of 2016, Tesla asked all employees, as a term and condition of employment, to sign the Confidentiality Acknowledgment. These facts alone establish "strong evidence of discriminatory intent." *Gallup,* 334 NLRB at 366.

While Tesla's witnesses testified that the Confidentiality Acknowledgment was created in response to the leak of nonpublic financial and production information in 2016, their testimony cannot be squared with the facts. This narrative does not explain, for one thing, why it was necessary to rewrite the existing confidentiality policy in such broad terms, treating "information about...employees" and everything you "learn about or observe in your work about Tesla" as confidential. Reminding workers about the importance of keeping proprietary information secret does not justify a policy this broad, particularly one without any hint of an exception for employees' Section 7 activities.

Second, when we look closer at this supposed leak, we see even more clearly that it was a pretext for tightening the screws on employees' Section 7 rights. It was, after all, Musk himself, not Tesla's hourly production associates, who chose to email purportedly nonpublic financial and production information to nearly 30,000 employees at Tesla. It defies common sense to claim

that this information was "private" in any meaningful sense of the word after Musk had decided to broadcast it to nearly 30,000 employees.

And, in fact, Musk himself had revealed the same information to the media earlier that same day. (Tr. 2053) Tesla's claim that it was only reacting to an inadvertent disclosure of nonpublic financial and production information is simply false—which tells us all we need to know about Tesla's real motives for restricting employees' Section 7 rights shortly after the Union's organizing drive went public.

3. Tesla Unlawfully Prevented Galescu from Documenting the Acknowledgment He Signed

Tesla violated Section 8(a)(1) when it prevented employee Jonathan Galescu from photographing a copy of his signed Confidentiality Acknowledgment. *See* Complaint ¶ 7(b). As detailed above, Galescu credibly testified that Tesla Human Resources Director David Zweig prevented him from taking a photograph of the Confidentiality Acknowledgment after he signed it. Zweig did not testify at the hearing, and Tesla did not offer any evidence to contradict Galescu's testimony regarding this incident.

Galescu's actions were plainly protected activity, as he sought to record a copy of the confidentiality rule that he and another employee had just been asked to sign. *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 274-75 (5th Cir. 2017); *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015).

Tesla will likely argue that it has a prohibition against taking photographs in the Fremont facility, and that *Boeing* confirms its right to maintain such as rule. That argument misses the point of what *Boeing* actually held.

While *Boeing* places "no-camera" rules in Category 1, that is not a blanket exception for all rules restricting the use of cameras in the workplace. On the contrary, as the Board in *Boeing* explains, "Although the *maintenance* of Category 1 rules…will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act." *Id.* at n. 76 (emphasis in original). Even if Zweig were arguably applying a no-camera rule, that does not permit him to restrict protected activity.

As Galescu testified, his photograph would have captured nothing but the document itself. Concerns about leaks of trade secrets or other proprietary information cannot justify Zweig's action.

Further, Zweig's promise to upload the document to Workday failed to mitigate or excuse this restriction on Galescu's protected activity. Galescu wanted a copy of the actual document he signed for review right away. The copy on Workday might not be the actual version with Galescu's signature, and it would not be available for his immediate review that day. There is no evidence, moreover, that Zweig ever uploaded the document.

B. TESLA UNLAWFULLY PREVENTED ITS EMPLOYEES FROM DISTRIBUTING UNION LITERATURE AND THREATENED THEM FOR EXERCISING THEIR SECTION 7 RIGHTS [SAC ¶ 7(c)(1), (n)-(o)]

Tesla unreasonably interfered with, restrained and coerced employees' protected right to distribute union literature off-duty in non-working areas on three days in 2017. On February 10, 2017, agents of Tesla told Sanchez, Ortiz, and Moran to leave the premises and took photographs of their employee IDs while they distributed union literature outside the plant. On March 23, 2017, Supervisor Armando Rodriguez announced a ban on all literature at the plant that was not Telsa-approved. And on May 24, 2017, agents of Tesla told Phillips he could not distribute union flyers, must leave the premises, and would be fired if he did not leave the premises, while confronting him in a combative formation. Tesla's conduct on each these days violated Section 8(a)(1).

It is well settled that the distribution of union literature by off-duty employees in nonworking areas of its premises is protected by Section 7 of the Act. *Republic Aviation*, 324 U.S. at 803-04; *St. Luke's Hospital*, 300 NLRB 836, 837 (1990); *Meijer, Inc.*, 344 NLRB 916, 917 (2005). An employer violates Section 8(a)(1) of the Act if its conduct would reasonably tend to interfere with, restrain, or coerce employees when distributing union literature off-duty in non-working areas. *Meijer, Inc.*, 344 NLRB 916, 917 (2005). Evidence of the employer's motive or its knowledge of the protected activity is not a necessary element of an 8(a)(1) violation. *Meijer*, 344 NLRB at 917.

Parking lots, building entrances, and break rooms are not considered working areas, even if incidental work is performed there. For an area to be a working area, the employer must demonstrate that the work performed there is integral to the business operation, as opposed to nonproduction work. *Meijer*, 344 NLRB at 917 (customer parking lot was not a working area, despite incidental work of retrieving shopping carts and assisting customers in loading their cars); *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000) (incidental functions of a casino, including valet parking, gardening, security, and maintenance, do not convert casino entrances into working areas); *Foundation Coal West*, 352 NLRB 147, 150 (2008) (hallway near time clock was not a working area, where the employer's main function was the processing of coal).

The Board has regularly found that even a single instance of security telling off-duty employees distributing union materials in nonworking areas to leave the premises or stop distributing the materials violates the Act. *St. Luke's Hospital*, 300 NLRB at 837 (finding a violation of Section 8(a)(1) where security director ordered an employee to stop distributing union literature in the employees' parking lot); *Brother Industries (U.S.A.)*, 314 NLRB 1218, 1230 (1994) (finding a violation of Section 8(a)(1) where plant security guards told the employees distributing union literature in the plant parking lot that they "could not do that on Company property" and to "to take it to the street"); *Solutia, Inc.*, 339 NLRB 60, 61-62 (2003) (finding a violation of Section 8(a)(1) where security told employees distributing union leaflets at plant gate to leave the premises); *Whirlpool Corp.*, 337 NLRB 726, 734 (2002) (finding a violation of Section 8(a)(1) where security supervisor told employees distributing union leaflets that they could not hand out literature on company property).

1. Tesla Interfered With, Restrained, and Coerced Tesla Employees During Six Different Encounters on February 10, 2017 [Complaint ¶ 7(c) – (i)]

Sanchez, Moran, and Ortiz gave credible and undisputed testimony that they were interfered with on no less than six different occasions by Tesla security guards while they were distributing the Time For Tesla To Listen flyer outside the Fremont Facility on February 10, 2017. In each of these encounters, the security guards' conduct, including asking them to leave the premises, photographing their identification badges, making anti-union comments, and

monitoring their activity, objectively restrained their protected activity in violation of Section 8(a)(1). *See* Complaint ¶ 7(c) – (i); *Meijer, Inc.,* 344 NLRB at 917.

These six incidents all shared a number of common features. In the first encounter, Sanchez testified that, not long after he parked his car near the entrance referred to as "Door 2" and began handing out the Time For Tesla To Listen flyer to co-workers entering and exiting the Fremont facility, a security guard approached him and asked him if he was a Tesla employee. After Sanchez replied "yes," the security guard told Sanchez he should "leave the premises."

Sanchez did not comply. Approximately five minutes later, the same guard came back and aggressively asked to see Sanchez's badge. When Sanchez handed the guard his badge he took a picture of the badge with his cell phone, then handed the badge back to Sanchez and again told him "to leave the premises." Sanchez knew the man was a security guard because was wearing a jacket with both "the Tesla logo" and the word "security" on it.

In the second coercive encounter, Sanchez testified—once again without contradiction—that an older Tesla security guard approached him as he was preparing to leave Door 2 and walk to Door 1. After the guard discovered Sanchez was handing out flyers supporting unionization, he stated "unions are worthless, you shouldn't join one."[46] This guard then also asked for Sanchez's badge, and, after Sanchez complied, also took a picture of the badge. Sanchez testified that older guard who confronted him was "wearing a security jacket with the Tesla logo" and "a hat," both of which said "security."

Sanchez then joined Ortiz and Moran, who were handing out the flyers to employees entering and exiting Door 1. This time a female security guard came out of Door 1 and told Ortiz, Moran, and Sanchez to leave the Fremont facility.[47] As before she was easy to identify as a Tesla security guard, since she was wearing a uniform with the Tesla logo of the sort that

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[46] Tesla Witness David Rios confirmed that he overhead Tesla security guard David Noakes tell a man handing out flyers outside Door 2 on that day that "unions were no good, and the unions did not do anything for him."

[47] Moran, Ortiz and Sanchez remembered her words slightly differently, either saying "You should leave the premises" (Sanchez), or telling them "we should leave, you know, we weren't allowed to be there" (Ortiz), or warning them "that we couldn't be there. We'd have to go. We can't do that…she was going to call someone." (Moran)

security guards wear at Tesla; Ortiz had also seen her working as a security guard, sitting at the security desk inside of Door 1.

Ortiz, Moran, and Sanchez all testified that they were also confronted by a male security guard at Door 1 within a few minutes of their confrontation with the female security guard. Each witness testified that this man asked for their badges and took a picture of them—a point confirmed by both Tesla witness Rios and Tesla's Exhibit 35, a series of six photographs of the front and back of their identification badges. As both Sanchez and Moran recalled, this guard also told them to leave the premises.

Later that morning a different female Tesla security guard approached Sanchez at Door 3 while he was handing out flyers and asked whether he was an employee. After Sanchez replied "yes," the guard told Sanchez he "should leave the premises" and asked for his identification badge.

Finally while Sanchez was handing out flyers at the back entrance to the Fremont facility, a supervisor emerged from inside the facility and asked "Are you José Moran?" After Sanchez replied "No, I'm not, but I am with him," the supervisor replied, "you need to leave the premises now." The supervisor then pulled out his phone, put it close to Sanchez's face, and dialed a phone number, at which point a female voice then said "Hello, Sanchez" and "I see that you're on leave of absence. I see that you got injured. You should be home resting." When Sanchez replied that he was within his legal rights to be there and was not going against his restrictions, she replied, "You should go home and rest. Can you please leave the premises?"

These three witnesses recalled some details differently, *e.g.*, Sanchez and Moran recalled being accosted by the female security guard at Door 1 first, while Ortiz thought that they had been challenged by the male guard at that door first. But all of them agreed on the details that mattered: each guard told them to leave and all of them, with the exception of the female guard at Door 1 and the supervisor who accosted Sanchez at the rear of the facility, demanded proof of

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their identity.[48] Their actions—which Tesla has by and large not even attempted to dispute—were coercive and violated section 8(a)(1).

2. Tesla Unlawfully Attempted to Prevent Branton Phillips from Distributing Union Flyers on May 24, 2017 [Complaint ¶ 7(n) – (p)]

Tesla repeated these intimidating tactics three months later, when Tesla security guards twice confronted and attempted to prevent Tesla employee Branton Phillips from handing out union literature on May 24, 2017. Phillips had tried to avoid this sort of confrontation by entering the building through Door 3, using his employee identification badge, and informing the female security guard who was sitting at the security podium in front of Door 3 that he would be distributing flyers to Tesla employees outside Door 3. Yet even though he was clearly a Tesla employee—he was wearing Tesla pants, a Tesla shirt, and a Tesla cap—the guard told him that he could not hand out flyers.

About ten minutes later, while Phillips was outside of Door 3 distributing flyers to his co-workers, another security guard approached him and said words to the effect that "So you're the one with the flyers." The guard then said, "I'm going to do you a favor. Leave right now and you won't be fired," or something similar. When Phillips replied that he was allowed to distribute flyers there, the same guard ordered him to give him his badge, which Phillips did.

At this point a second security guard approached Phillips, and the first security guard repeated his command to leave the premises. Phillips, now becoming worried, called the UAW for advice, because he believed the law permitted him to distribute the flyers to co-workers at the building entrance. The UAW representative, via speakerphone and audible to the security guards, told Phillips to remain calm and noncombative.

The guards continued to escalate the confrontation. While Phillips was on the phone, he overheard one of the guards say into his radio "He refuses to give me his badge," to which Phillips responded, "That's not true. I gave you my badge." At this time a third security guard approached Phillips, and the three guards enclosed Phillips by positioning themselves in a 10:00,

[48] That supervisor did not demand proof of Sanchez' identity, for the simple reason that Tesla not only knew his and Moran's names, but even knew that Sanchez was on medical leave at the time.

12:00, and 2:00 formation, a "combative" position, in front of Phillips. Phillips, like any other employee surrounded by security guards in this formation, reasonably feared that he was about to physically attacked.

Just as the guards prepared to use physical force, a fourth security guard arrived in a Tesla security vehicle and asked the three security guards in combative formation whether Phillips was "flyering." After one of the guards replied in the affirmative, the lead security guard stated, "Leave him alone. He's allowed to do that." The first three security guards then departed, while the fourth security guard remained in his vehicle watching Phillips distribute flyers to employees for approximately ten minutes.

Tesla's witnesses did not contradict or dispute any of Phillips's testimony; on the contrary, neither of the security guard witnesses whom Tesla called had any competent testimony to offer. All that Tesla witness Felipe De La Cruz could recall is that he dispatched six units to patrol the parking lot that day based on nothing more than a report of union leafleting—classic protected Section 7 activity.

That is not to say that Tesla did not try to concoct some sort of justification for treating Phillips as if he were a threat to the security guards, rather than vice versa. While De La Cruz tried to justify the events of May 24, 2017 by describing an instance of an individual using a fake badge to gain entrance to the Tesla facility,[49] that incident has no bearing here, since Phillips could not have been mistaken for a non-employee: he was wearing his Tesla work attire, had already entered the building and identified himself to security guard on duty, and then had given his employee badge to the first guard to approach him outside. Far from helping its case, these attempts to justify Tesla's conduct only show that much more clearly how unlawful it was.

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[49] That incident had, in fact, almost nothing in common with Tesla's decision to swarm Phillips on May 24th: it did not involve activities by an employee in the parking lot, much less the distribution of Union flyers.

To the extent Tesla relies on RX 24, RX 25, and RX 26 as justification for its aggressive response to Union leafletting on February 10 and May 24, 2017, those exhibits are just as far off the mark, since none of them involve the violations alleged in this case. Further, the contents of RX 25 consist of unsubstantiated hearsay and are unrelated to employees distributing union literature.

3. The Individuals Who Tried to Stop Employees From Distributing Union Flyers on February 10 and May 24, 2017 Were Tesla's Agents

a. These Guards Had Actual Authority to Act for Tesla

All of the security guards described above were agents of the Respondent, within the meaning of Section 2(13) of the Act. The Board applies common law agency principles to determine the existence of an agency relationship.

Actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. *Wal-Mart Stores, Inc.*, 350 NLRB 879, 884 (2007) *quoting Tyson Fresh Meats*, 343 NLRB 1335, 1336 (2004).

For responsibility to attach, it is not necessary that the principal expressly authorize, actually desire, or even know of the action in question. *Wal-Mart*, 350 NLRB at 884. A "principal is responsible for its agent's actions that are taken in furtherance of the principal's interest and fall within the general scope of authority attributed to the agent." *Tyson Fresh Meats*, 343 NLRB at 1337, quoting *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984). Moreover, under the common law of agency, a principal may be responsible for its agent's actions if the agent reasonably believed from the principal's manifestations to the agent that the principal wished the agent to undertake those actions. *Wal-Mart*, 350 NLRB at 884.

Tesla claims that these guards were not its agents and insists, in fact, that they were acting contrary to Tesla's instructions when they systematically harassed Sanchez, Ortiz, Moran and Phillips repeatedly on February 10 and May 24, 2017. That argument defies common sense, not to mention simple mathematics: for Tesla's defense to hold water six different guards on February 10th and four different guards on May 24th must have each decided, not only without Tesla's support but in defiance of its express instructions, to order these Tesla employees to leave the premises. The odds of that happening purely by coincidence twice on one day are slim; the likelihood that these different security guards would all decide to challenge Union leafletters, demand their identification, and then order them to leave on six separate occasions on a single day and then twice on another day three months later are astronomically remote. All of Tesla's

denials of responsibility cannot change the fact that these individual guards were all following the same pattern, with only minor deviations.

Nor can Tesla wish away the fact that these security guards' actions were wholly consistent with Tesla's demonstrated record of hostility to all forms of criticism of it or signs of support for the UAW from its employees. Tesla had, as noted above, illegally banned employees from discussing their terms and conditions of employment in writing and communicating with the media and other outsiders about workplace issues in its plants. It prohibited employees from distributing literature of which it did not approve and barred them from wearing UAW T-shirts, badges, and hats. Trying to intimidate Union leafletters was not at odds with Tesla policy—it was part of it.[50]

But even if their conduct were inconsistent with Tesla's policies, these guards were still acting within the scope of their actual authority. Tesla was responsible for these security guards' unlawful actions.

b. These Guards Had Apparent Authority to Act for Tesla

In addition to actual authority, the Board also applies the common law doctrine of apparent authority. *Wal-Mart*, 350 NLRB at 884; *D & F Industries,* 339 NLRB 618, 619 (2003). Apparent authority results from "a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." *D & F Industries,* 339 NLRB at 619, *quoting Cooper Industries*, 328 NLRB 145 (1999). The test is whether, under all the circumstances, the "employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management." *D & F Industries*, 339 NLRB at 619. Section 2(13) of the NLRA underscores this point by declaring that, when making the agency determination, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. § 152(13); *see also Poly-American v. NLRB,* 260 F.3d 465, 480 (5th Cir. 2001).

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[50] While Tesla purports to have a policy permitting solicitation or distribution by off-duty employees in nonworking areas, (RX 10, Tr. 1435), this policy cannot be found in the employee handbook (RX 5) and there is no evidence that employees even knew it existed.

Under this test, the Board has regularly found security guards to be an employer's agents based on their apparent authority. *See, e.g.*, *Perdue Farms, Inc.*, 323 NLRB 345, 351 (1997) (finding agency status based on apparent authority where employer placed unnamed security guard in a position to stop persons entering the plant premises); *Hercules Drawn Steel Corp.*, 352 NLRB 53, 72 fn. 19 (2008) (finding agency status where employees "could reasonably have believed" the security guards were agents of employers based on their actions); *Bakersfield Memorial Hospital*, 315 NLRB 596, 604 (1994) (security guards were agents of employer, despite not acting under express authority when recording union supporters' license plates, because employees "witnessed the guards doing so in apparent interest" of the employer).

The testimony by Sanchez, Ortiz, Moran, and Phillips establishes apparent authority. A reasonable employee would believe during each encounter with the security guards described above that they were acting under Tesla's authority. These guards wore shirts, hats, and jackets that said both "Tesla" and "security." They were stationed at the entrances to the building, and employees saw them every day making sure unauthorized individuals did not enter the building. They issued the sort of orders—to produce their employee badges and to leave the premises—that no stranger could have made and that no Tesla employees would have followed if they did not think that these guards had Tesla's authorization to do so. The only reason that Sanchez, Ortiz, Moran, and Phillips did not leave when ordered to was that they knew their rights—rights that these guards were determined to deny them.

An employer's failure to disavow the actions of an employee or third party supports the finding that the individual acted as an agent of the employer. *Cagle's, Inc.*, 234 NLRB 1148 (1978) (agency relationship found in part because employer failed to disavow actions of third party distributing anti-union flyers on union premises). Tesla never disavowed any of these guards' actions.

On the contrary, a Tesla supervisor, wearing the red shirt that Tesla requires all of its supervisors to wear, repeated the unlawful orders that the Tesla guards had made earlier that morning. The same is true for the unnamed woman who spoke to Sanchez on that supervisor's phone—and who knew the details of Sanchez's medical leave—who repeated those unlawful

orders to leave the premises. Any reasonable person would conclude that both the supervisor and the woman on the phone were "reflecting company policy and speaking and acting for management." *D & F Industries*, 339 NLRB at 619. Indeed, it would have been unreasonable for Sanchez to think otherwise. Tesla is responsible for all of these individuals' unlawful actions.

4. Tesla Has No Justification for Its Attempts to Prevent Employees from Distributing Union Materials

There is no evidence that any of the employees on February 10 or May 24 engaged in any disruptive conduct of the sort that would strip them of the protection of the Act. As both Sanchez and Phillips testified, they were not using an amplifying device, did not threaten employees, and did not make any hostile gestures toward any employees while distributing flyers to co-workers. There is likewise no evidence that they were blocking the ingress or egress of people entering or exiting the Fremont facility.

While Tesla may claim a right to ensure that individuals standing near its building entrances are in fact employees, this is not in fact its actual practice when employees engage in non-union activities at those locations. Sanchez testified without contradiction that, despite taking daily smoke breaks in the parking lot of the Fremont facility since he began working there in 2012, he was only asked once for identification during these breaks, and never told to leave the premises.

Finally, Tesla has made no attempt to repudiate its agents' attempts to deny Sanchez, Ortiz, Moran and Phillips their right to distribute union literature on February 10 or May 24, 2017. *Cf. Nice Pak Products*, 248 NLRB 1278, 1282-83 (1980) (where the offending supervisor apologized to the affected leafletter, retracted his prohibition on distribution, and the leafletter communicated this message to other employees, a single effort to stop an employee from distributing leaflets on company property did not violate the Act). Rather, the record shows not only that the Company never apologized for these actions or admitted that employees had the right to distribute flyers, but continued to take other actions to restrict protected activity, while criticizing the Union and Union activists all the while.

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C. TESLA UNLAWFULLY ATTEMPTED TO PROHIBIT ALL LITERATURE AT THE PLANT NOT APPROVED BY TESLA [SAC ¶ 7(j)]

Armando Rodriguez, Galescu's supervisor, announced a prohibition on distribution of any literature not approved by Tesla at a pre-shift morning meeting on March 23, 2017. This is an obvious violation of the Act.

Section 8(a)(1) of the NLRA prohibits maintenance of a policy that prohibits off-duty employees from distributing union literature on the Respondent's property in non-working areas "without a legitimate business justification." *St. Luke's Hospital*, 300 NLRB at 837. Tesla has not even attempted to offer a business justification for this ban, but instead denies it has ever announced, maintained, or enforced such a policy.

Rodriguez did not deny that he had made an announcement to Tesla employees on the day in question. He claimed, however, that he only prohibited stickers used to deface company property. Rodriguez' own testimony effectively demolishes this claim.

First, Rodriguez admitted announcing a prohibition on "literature that's not Tesla approved" during his March 23, 2017 announcement. Rodriguez used this phrase completely on his own, without previous exposure to the phrase or prompting by counsel. His testimony mirrors Galescu's on this point.

That admission dooms any claim that he only meant to prohibit stickers. No English speaker would use the word "literature" to describe stickers. Nor would it make sense to require Tesla's approval if the policy was limited to prohibiting stickers that deface property. Rodriguez's use of this phrase "literature that's not Tesla approved" was a classic Freudian slip, one that revealed what Tesla aimed to do and that confirms Galescu's account.

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Second, Rodriguez insisted that he did not read his announcement out of his little black book. Yet the reason he gave for knowing that he did not read this announcement out of that book—namely, that he only read out of this book when he had multiple announcements—could not stand up under close examination, since Rodriguez admitted that he did not recall whether he

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made multiple announcements that day. Rodriguez' attempt to counter Galescu's testimony fell flat.

Finally, Rodriguez had every incentive to lie, while Galescu had none. Rodriguez could face discipline if it were found that he had violated the Act. Galescu, by contrast, invited retaliation by testifying about Tesla's misconduct.

Tesla may argue it never maintained or enforced a prohibition on non-Tesla approved literature, even if Rodriguez did announce such a policy. That is not a defense; the announcement itself violates the Act, since employees have every right to assume that Tesla will enforce it if they defy the rule. Tesla never repudiated the rule or disavowed Rodriguez.

D. TESLA UNLAWFULLY OBSTRUCTED TESLA EMPLOYEES' ABILITY TO SHARE OSHA LOGS AND OTHER SAFETY INFORMATION WITH OUTSIDE ENTITIES [SAC ¶ 7(k), (m)]

Tesla unlawfully restrained and coerced Tesla employees on April 5, April 28, and May 2, 2017 when it attempted to prevent employees from discussing safety concerns with other employees and outside representatives. Section 7 protects employee efforts to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex,* , 437 U.S. at 565. Consistent with *Eastex*, the Board has held that an employer violates Section 8(a)(1) of the Act when it restricts employees' concerted communications regarding safety with third parties. *Murray American Energy*, 366 NLRB No. 80 (2018); *Trinity Protection Services*, 357 NLRB 1382, 1383 (2011).

On April 5, 2017 Zweig provided them with the documents they had requested, but with a "confidential" stamp and with employees names redacted. That "confidential" stamp invoked the Company's Confidentiality Acknowledgement, which Tesla had required both Galescu and Ortiz to sign.

Under that policy, employees are prohibited from "discussing confidential information with anyone outside Tesla," and a violation of this policy could include "loss of employment." Under these circumstances, reasonable employees would believe that they would face discipline

for sharing OSHA Logs with any outside entity, including the UAW or Worksafe. Furthermore, by redacting the names, Zweig prevented the employees from identifying and communicating with injured co-workers to confirm the accuracy of the information received.

Any argument that Tesla took these actions to comply with federal or state law must fail. Federal and State law requires employers to provide access to OSHA Logs upon request for employees, former employees, and their "personal representatives." 29 CFR 1904.35; Cal. Code Regs., tit. 8, § 14300.35. Further, employers must provide complete copies of OSHA 300 Logs, with no names or other information removed. 29 CFR 1904.35(b)(2)(iv); Cal. Code Regs., tit. 8, § 14300.35(b)(2)(D). Tesla cannot claim that it did not violate the Act because it was following applicable state or federal law.

On April 28, 2017, when Tesla finally provided Galescu and Ortiz the documents without redactions or confidentiality stamps, it continued to restrain and coerce protected activity when it wrote to employees that "[w]e care deeply about our employees' privacy and have tried to protect it to the best of our ability." Both the premise and the conclusion are false.

First, the law requires Tesla to share this unredacted information with employees such as Galescu and Ortiz so that they can protect all employees' interests. Galescu and Ortiz were engaged in classic Section 7 activity by demanding release of the information they needed to deal effectively with workplace safety issues.

These CalOSHA Logs and summaries did not, moreover, contain any private medical information of any employee. Yet Tesla tried to cast Galescu and Ortiz as a threat to employees' privacy rights without any factual basis for that outlandish claim.

Tesla continued this disinformation campaign on May 2, 2017, when Tesla Vice President of Production Peter Hocholdinger sent an email to all employees at the Fremont facility stating that "one of our employees" requested the OSHA 300 Logs and that "we believe this request is intended to ultimately make this information public despite our efforts to protect your privacy." Both the April 28 and May 2, 2017 statements had a reasonable tendency to coerce employees from lawfully sharing injury data with third parties.

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E. TESLA'S AGENTS COERCIVELY INTERROGATED GALESCU AND ORTIZ ON MAY 24, 2017 IN VIOLATION OF SECTION 8(a)(1) [SAC ¶ 7(q)]

On May 24, 2017, Tesla's Human Resources Business Partner Lisa Lipson and Tesla's Environmental Health, Safety, and Sustainability Specialist Lauren Holcomb interrogated Ortiz and Galescu in separate meetings about their own, and their co-workers', protected concerted activities. Tesla's attempt to turn Ortiz and Galescu into informants violated the Act.

In determining the lawfulness of an interrogation the Board evaluates whether, under the totality of the circumstances, it reasonably tended to restrain, coerce, or interfere with the employees' exercise of their protected rights under the Act. *Bristol Industries*, 366 NLRB No. 101, * 1 (2018); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984). An "interrogation which seeks to place an employee in the position of acting as an informer regarding the union activity of his fellow-employees is coercive." *Abex Corp.,* 162 NLRB 328, 329 (1966); *Wackenhut Corp.*, 348 NLRB 1290, 1300 (2006). The fact that such interrogation is done in a "casual manner during a friendly conversation does not lessen its unlawful effect." *Abex Corp.,* 162 NLRB at 329 (interrogation violated Section 8(a)(1) where plant superintendent asked employees who was trying to start a union "in a very casual manner").

Lipson's interrogation of Galescu and Ortiz each included direct inquiries into their protected concerted activity. Holcomb's contemporaneous notes of the meeting with Ortiz state, "Ms. Lipson asked the following questions to Ortiz… Did you provide the logs to others? To whom did you provide them?" She recorded that Ortiz responded, "I haven't touched them, I haven't seen them."

Holcomb also recorded that, during the meeting with Galescu, "Ms. Lipson asked the following questions to Galescu, 'Did you provide the logs to others? To whom did you provide them?'" (GCX 91) She recorded Galescu's response as "If you would like to ask me some more questions, I would like outside representation present." (GCX 91)

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These notes confirm the testimony of Galescu and Ortiz.[51] Galescu testified Lipson "asked me who did I give them to," while Ortiz testified that Lipson "asked me what I did with them." Ortiz also testified that Lipson asked whether he "knew if Jonathan had done anything with the 300 logs." Both Galescu and Ortiz refused to reveal whom Galescu gave the OSHA Logs to.

Tesla had no legitimate reason for conducting the interrogations. Before calling Galescu and Ortiz into the meetings, the Tesla already knew that it had provided OSHA Logs to Galescu and Ortiz, that Galescu and Ortiz had asserted their right under federal and state law to share those documents with their representatives, and that Tesla employees distributed a flyer on May 24, 2017 describing a new report analyzing Tesla's OSHA Logs. This flyer even stated "Tesla workers recently exercised their right to this data, and shared it with a California non-profit for analysis" and included a link to the full report, where the Company could confirm for itself that no personal data had been released publicly. The Company therefore had no reason to believe that personal data had been improperly shared or released to the public.

Nevertheless, Tesla insisted on interrogating these two employees about their lawful activity. These interviews could serve only two possible purposes: (1) to harass and intimidate Galescu and Ortiz for shining a light on the Company's poor safety performance or (2) to conduct a fishing expedition to acquire more information about the employee's protected activity. Neither of these purposes is legitimate. Under the totality of the circumstances, these interrogations plainly had a reasonably tendency to restrain, coerce, or interfere with the employees' exercise of their protected rights in violation of Section 8(a)(1).

Employees' refusal to reveal the details of protected activity during an interrogation support a finding that the interrogation was unlawful. *Bristol Industries*, 366 NLRB No. 101 at *1 (2018); *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007). Even though Galescu and Ortiz had the right to share the OSHA Logs with their co-workers and their personal

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[51] Tesla refused to produce these notes, despite the Charging Parties' demands for them, until the hearing was underway. The contents of the notes explain Tesla's reluctance to produce them: it knew that they would only hurt, not help, its case. See Section V.

representatives, both employees felt wary of revealing such information to Tesla because of the coercive nature of the interrogation.

F. TESLA UNLAWFULLY SOLICITED SAFETY GRIEVANCES [SAC ¶ 7(y)(i)]

On June 7, 2017, a day after Moran and other employees personally delivered a petition to management criticizing safety conditions and requesting a union, Musk and Toledano held a private meeting with Moran and his co-worker Vega. At the meeting, Moran testified that he and his co-worker explained some of their safety concerns and Moran stated the employees desire to form a union in order to "to have a voice in the plant." Toledano, in her testimony, denied that there was any discussion of the Union, but admitted that the Company held the June 7, 2017 meeting with Moran in response to his June 6, 2017 email and the employee petition requesting a union. Toledano also admitted that Tesla offered to include him in safety committee meetings—which was also, as her later email admits, a response to employees' desire for union representation.

During this June 7, 2017 meeting Tesla's CEO Musk solicited employee complaints about safety issues and promised to remedy those safety complaints. Tesla had not invited safety complaints in the past, much less established a practice of resolving them through this sort of complaint procedure.

Soliciting grievances during an organizing campaign, accompanied by the promise, expressed or implied, to remedy such grievances, violates the Act. *Advancepierre Foods, Inc.*, 366 NLRB No. 133 (2018). This includes promising or implementing new safety programs in response to organizing activity. *Gunderson Rail Services,* 364 NLRB No. 30 (2016); *Huntington Rubber Co.*, 260 NLRB 1008, 1018 (1982). Tesla violated the Act by doing so in this case.

Tesla's violation is even clearer here, since it solicited safety grievances in order to dissuade employees from supporting the Union. In emails on June 12 and 13, 2017, Musk expressly admitted that the purpose for including Moran in safety committee meetings was to undermine the organizing campaign.

At 9:41 p.m. on June 12, 2017, Toledano stated to Musk it was "super smart" to have Moran on the safety team working full time "vs work to pull in the UAW." She also referred to

this action as "turn[ing] adversaries into those responsible for the problem." At 10:53 p.m. Musk responded "exactly."

Tesla in fact wanted to go one step further: Toledano replied to Musk's June 12, 2017 email, saying she was looking into whether, if the union leaders "join the Safety team[,] then they would then be considered part of management and not eligible to advocate for a union should they accept these roles." Tesla was hoping to use one of the oldest tricks in the book to decapitate a union organizing drive by promoting the leaders out of the unit and into management.[52]

This email constitutes undisputed direct evidence that Musk's intention when soliciting Moran's grievances and including him on the safety team was to dissuade him from union organizational activity. Tesla violated the act when its agent, Musk, solicited safety complaints from Moran and assigned him and other employees engaged in union activity to a safety committee in order to dissuade them from supporting union organizational activity.

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[52] That sort of involuntary promotion into a managerial or supervisory position would have been an unlawful constructive discharge if management had actually followed through on Toledano's suggestion.

Tesla may argue that it could not have had any animus against Moran based on his advocacy of employees' safety concerns because CalOSHA dismissed the Workplace Safety Complaint that Ortiz and Galescu filed, showing that their safety concerns were unfounded. Both the premise and the conclusion are false.

CalOSHA dismissed the complaint because Tesla had come into compliance by the time of its investigation, Dismissal did not mean that no violations had occurred in the past. Similarly, CalOSHA does not investigate or adjudicate retaliation complaints from safety whistleblowers.

But even if it dismissal of Ortiz's and Galescu's safety complaint actually represented a decision on the merits, that would still have no bearing on Ortiz's, Moran's and Galescu's Section 7 rights to protest perceived safety violations, even if they had been mistaken. *Zurn Industries, Inc. v. NLRB*, 680 F.2d 683 (9th Cir. 1982) ("The Board has jurisdiction to investigate unfair labor practices, which include discharges based on protected activity such as voicing safety complaints; that the employees may also have had other rights or remedies under the Occupational Health and Safety Act does not divest the Board of jurisdiction.")

G. TESLA'S INSISTENCE THAT EFFORTS TO ORGANIZE A UNION WOULD BE FUTILE VIOLATED THE ACT [SAC ¶¶ 7(y)(ii), 7(y)(iii)]

1. Tesla's Statement that Unionization Would Be Futile Violated the Act

Tesla violated the Act during this June 7, 2017 meeting when Musk implied to Moran and Vega that selecting a union as their bargaining representative would be futile. Moran credibly testified that Musk told him that with UAW representation, the workers "don't really have a voice." Musk's claim that workers would not have a voice if they chose a union conveyed the message that employees' efforts to organize a union at Tesla would be futile.

Moran further testified that Musk said the Company would "give you your union" if the safety committee meeting don't work out, implying that the Company would decide if and when the workers unionized, not the workers themselves. That is, of course, contrary to the very principles on which the Act is based. It is also unlawful.

2. Tesla's Statement that Employees Did Not Want a Union Violated the Act

Chief People Officer Toledano also violated the Act by telling Moran during that June 7, 2017 meeting that "the majority of the workers at Tesla don't want a union" and then rhetorically asked why workers would want to pay union dues. Those comments reasonably tend to coerce employees from engaging in protected concerted activities because they imply (1) that management has unlawfully polled employees and determined there is insufficient support for a union and (2) that union dues have no value because the union will be unable to negotiate for improved benefits.

3. Tesla Violated Section 8(a)(1) When Its Agent Homer Hunt Told A Tesla Employee That Tesla Will "Never" Have A Union [SAC ¶ 7(s)]

Mike Williams, formerly employed by Tesla as a Welder in the Body in White Department, spoke with Homer Hunt, a supervisor of quality control at Tesla, in August 2017 about a promotion Williams had applied for, but did not receive. According to Williams, during this conversation he stated to Hunt, "That's why we need a Union in here so that that the right

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people are getting put in the right positions." Hunt responded "The union's never getting in here. This is Tesla."[53]

Williams—and any other employee for that matter—would reasonably understand Hunt's statement to threaten that supporting a union was futile because Tesla would not recognize or bargain with a union. *See Maxi City Deli,* 282 NLRB 742, 745 (1987) (employer's comment that "there would never be a union at his restaurant" violated Section 8(a)(1)); *Venture Industries,* 330 NLRB 1133 (2000) (Manager's statement to two employees that "the plant would never be a union shop" violated Section 8(a)(1)). Hunt's statement violated the Act.

H. TESLA MAINTAINED AND ENFORCED A POLICY THAT UNLAWFULLY PROHIBITED EMPLOYEES FROM WEARING UAW SHIRTS, HATS AND OTHER INSIGNIA [SAC ¶ 7(l), (t) - (v)]

Tesla's Team Wear policy, as maintained and enforced, violates Section 8(a)(1) of the Act, because it restricts the right of employees to wear a UAW T-shirt at work, in the absence of any special circumstances to justify such a restriction. While Tesla has raised any number of supposed justifications for this policy, from fear of mutilation of vehicles, to safety and "visual management," all of those justifications collapse on examination. Tesla had no reason, other than anti-union animus, to justify a distinction permitting "Team Wear" shirts and prohibiting UAW shirts, which differ only in which insignia is on the shirt.

It is well settled that an employee has the protected right to wear union insignia while at work. *Republic Aviation*, 324 U.S. at 801-03. In *Republic Aviation,* the Supreme Court approved the Board's holding that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and [an employer's] curtailment

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[53] Hunt denied that the Union ever came up during the conversation, but admitted he did not remember specifically everything that was said. He characterized his conversation with Williams as a "yelling contest" that involved him listening to Williams "vent to me about not getting the position."

Williams' testimony should be credited over Hunt's. While Hunt dismissed Williams' claims, his recollection of the conversation was devoid of details. Hunt was, moreover, agitated throughout his testimony and displayed a personal animosity for Williams. And, of course, Williams' account of this conversation dovetails with the anti-union message that Tesla was broadcasting, from its CEO on down.

of that right is clearly violative of the Act," absent a showing of special circumstances. This protection extends to pro-union T-shirts. *See, e.g. Wal-Mart Stores*, 340 NLRB 637 (2003); *Publishers Printing Co.,* 246 NLRB 206 (1979); *De Vilbiss Co.*, 102 NLRB 1317, 1321 (1953).

The undisputed facts of this case show that Tesla promulgated and enforced a uniform policy that restricted employees from wearing UAW T-Shirts in the General Assembly department. General Counsel witnesses testified of being ordered to remove their UAW T-shirts or else be sent home for the day, and Tesla witnesses and emails admit to a prohibition on UAW T-shirts. Such a prohibition constitutes a restriction of protected activity.

The only dispute is whether "special circumstances" existed to justify Tesla's restriction of protected activity. The Board has recognized that special circumstances may justify the prohibition of union insignia when their display may "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established." *Bell-Atlantic Pennsylvania*, 339 NLRB 1084, 1086 (2003); *Boch Imports*, 362 NLRB No. 83 (2015). However, a rule that curtails employees' Section 7 right to wear union insignia in the workplace must be "narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances." *Id.*

Tesla witnesses provided three possible special justifications for its "Team Wear" policy: (1) prevention of mutilation to the vehicles, (2) visual management of the different classes of employees, and (3) ensuring baggy or long clothes don't get caught in the machines. None of these have merit.

1. The Prevention of Mutilation of Vehicles Cannot Justify Prohibiting Employees from Wearing UAW T-Shirts

Tesla argues that damage to its product, or "mutilation," justifies its broad Team Wear policy that prohibits UAW T-shirts. Under Board precedent, special circumstances for prohibiting union insignia based on product damage requires an actual connection between the restricted protected activity and the product damage. *See Boch Imports, supra*; *Consolidated*

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Biscuit Co, 346 NLRB 1175 (2006); *The Kendall Co.,* 267 NLRB 963, 965 (1983). Tesla has not come close to meeting this burden.

In *Boch Imports*, a car dealership, which also repaired and maintained vehicles, argued that its dress code policy prohibiting employees from wearing pins existed to prevent damage to vehicles. 362 NLRB at *3. The Board found this rule to be overly broad, because it restricted protected activity. It further found that the employer had not demonstrated special circumstances justifying its restriction on protected activity, noting that although the record contained evidence of employees causing damage to vehicles, "none of that damage was shown or even asserted to be related to employee pins." *Id.*

On the other hand, the Board has found special circumstances where an established link existed between the restricted protected activity and the product damage. *Consolidated Biscuit Co*, *supra* (special circumstances existed where ink from pro-union marker messages on employees arms could contaminate food products); *The Kendall Co., supra* at 965 (special circumstances existed where union keychain worn on outside of shirt could become drawn into the machine).

In this case, Tesla's own witnesses gave numerous possible causes of mutilation, yet never cited UAW T-shirts. Tesla witness Mario Penera, a Senior Manager in General Assembly, testified that causes of mutilations included "equipment and tools, … parts themselves, … and then also things that people may have on them, [like] rings, watches, pants that have rivets on them, keys hanging from their belt loop, bulky, sharp things in their pockets." When asked if there were any other reasons he could think of, Penera testified "no."

Tesla witness Kyle Martin, the Production Manager for General Assembly 4, testified that causes of mutilation included "too many things in your apron pockets, if you have a tool sticking out of your back pocket," "jeans that have rivets on them," T-shirts with "raised emblems on them…like the Gucci shirts" with "metal" and "gold emblems,"[54] tooling if it "doesn't have the production around the tooling head piece, as its rotating, it can scratch the side IP," and belts, rings, and watches. Martin also testified that a Company audit concluded that the

[54] The UAW T-shirts had neither a raised nor metal emblem.

causes of mutilations were "tooling" when the cover wasn't properly applied, "the behavior of associates getting in and out of cars, if they had tools in their pocket," a "plastic spoon" used by associates to install trim pieces, and "rivets on the jeans brushing up against the seat." Tesla's exhibits, similarly, provide no connection between mutilation concerns and the UAW T-shirts.[55]

Missing from both Penera and Martin's long lists of mutilation causes was any mention of T-shirts or other soft fabric items. Penera even testified that he did not know of any car damage linked to the UAW T-shirts.

On the other hand, former employees Jayson Henry, Sean Jones, and Tim Cotton testified credibly and without contradiction that the UAW T-shirts did not contain any material that could scratch or harm the vehicles manufactured at the Fremont facility. Tesla has failed to provide a single piece of evidence connecting the UAW T-shirts with mutilations. Without such evidence, Tesla cannot possibly meet its burden of showing that fear of mutilation justified prohibiting UAW T-shirts.

This should not come as a surprise, considering that both the Tesla-approved Team Wear shirts and the UAW shirts are made of the exact same material—cotton. As Penera testified about Team Wear, "It's a T-shirt—cotton T-shirt." Martin testified similarly, "It's just a soft cotton material."[56] For the UAW T-shirts, Cotton and Jones both testified the shirts were made of cotton, and Tesla did not—and could not—dispute this fact.

The only true difference between the shirts is that the Team Wear shirts have a Tesla insignia while the UAW shirts have both the Tesla logo and a UAW insignia. This difference, however, is not a justification for a prohibition; on the contrary, it is instead what makes the UAW T-Shirts protected under the Act.

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[55] In fact, these exhibits deal only with seat mutilations, which cannot plausibly be damaged by a T-shirt. As Tesla witness Martin admitted, T-shirts did not cause the seat mutilations they identified.

[56] Two additional Tesla Witnesses testified similarly. Tim Fenelon, a former production supervisor in General Assembly, when asked "They're cotton?" testified, "Yes" And Tope Ogunniyi, a former associate manager in General Assembly, when asked "And common to all those [Team Wear] shirts is they're all black, right? They're all cotton?" responded, "They're also issued by Tesla."

2. The Alleged Need for Visual Management Does Not Justify Prohibiting Employees from Wearing UAW T-Shirts

Tesla witnesses Penera and Martin also testified that Team Wear was necessary to provide a "visual management system." Both witnesses explained that associates wear black shirts, team leads and supervisors wear red polo shirts, and quality inspectors wear white polo shirts. According to Martin, this system "lets you know that people are where they're supposed to be, and also lets you know if there's somebody there that's not supposed to be." Penera similarly explained, Team Wear is "how I know as a manager who should be there, who shouldn't be there." In this regard, both Martin and Penera emphasized the large amount of people moving through the Fremont facility, including tours and employees from other lines. Penera also testified that, if an issue arises, "I know immediately who I can go to," and quality inspectors, if they spot a defect, "know exactly who they can talk to."

This justification however fails when applied to the UAW T-shirts. First and foremost, the UAW T-shirt is black, as is the assigned Team Wear for production associates. An associate wearing the UAW shirt could not suddenly be mistaken for a supervisor, whose assigned shirt is a red polo.[57] Second, if Team Wear's purpose was to visually identify employees on the line, this justification would logically apply to the entire Fremont facility, not just General Assembly. Tesla provided no evidence on why General Assembly would need to differentiate employees, and other departments do not.

Third, the claim that managers could not tell whether someone wearing a UAW shirt was part of General Assembly is irrelevant, because managers could not tell whether employees in Team Wear-compliant clothes were part of General Assembly either. Under Tesla's Team Wear policy, a plain black T-shirt was compliant. Plain black T-shirts are, of course, not unique to General Assembly, and could be worn by employees in other departments, or even visitors on tours. Further, Tesla-issued "Team Wear" shirts and pants, containing the Tesla insignia, were

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[57] Tesla offered no evidence that leads or inspectors in General Assembly have ever worn black UAW T-shirts. Prohibiting all associates in General Assembly from wearing UAW shirts, in order to prohibit leads and inspectors from wearing them, would be a wildly overbroad as well as unnecessary rule.

not unique to General Assembly either and were worn by employees all over the facility and even available for purchase in the Company store.

In fact, the entire "visual management" argument for Team Wear appears to be a post-hoc rationalization, rather than a genuine concern. Tesla's exhibits repeatedly reference mutilation as the justification for Team Wear, but not once do these documents reference visual management. The General Assembly Expectations, for example, state, "Alternative clothing must be mutilation free, work appropriate and pose no safety risks (no zippers, yoga pants, hoodies with hood up, etc." They do not mention the importance of wearing a distinct black shirt that allows managers to tell General Assembly associates apart from other associates or visitors.

Penera also offered a second, somewhat conflicting, definition of "visual management," which Martin did not mention. He testified Team Wear "makes it easier for the supervisor…to scan 30, 40 people rather than having to check 30, 40 people individually to see if their pants are going to be too abrasive, to see if their shirt has any mutilation risk on it." (Tr. 1375) However, unlike the numerous types of Tesla-approved Team Wear shirts, only one UAW Shirt existed, and it was mutilation-free. The visual "scan" Penera describes would not be hampered by some, or all, employees wearing identical black UAW shirts, instead of the multiple, permitted black Tesla shirts.[58]

3. Employee Safety Concerns Do Not Justify the Team Wear Policy

Finally, Tesla has asserted that Team Wear is necessary for the safety of employees. Under Board precedent, Tesla bears the burden of showing an actual connection between this justification and the prohibition of protected activity. *Boch Imports*, *supra*; *The Kendall Co.*, *supra* at 965 (special circumstances existed where union keychain worn on outside of shirt could become drawn into the machine).

In his testimony, Penera suggested that Team Wear ensures that all employees wear clothes that are "not too long, it's not too baggy, it's not going to get caught in equipment or

[58] In explaining this justification, Penera also suggested it would be easier for a supervisor to manage employees in Team Wear, and mimicked a supervisor saying, "hey, you guys look like a team." Penera did not explain why prohibiting UAW shirts would make employees easier to manage, but this veiled anti-union comment aligns with Musk's comments that the UAW wants "divisiveness."

tools."[59] However, Penera did not assert that the UAW T-shirt poses a safety risk. Nor could he, as the shirt is identical in almost every way to Tesla-issued shirts.

Penera further testified that "in the event of an evacuation, [Team Wear] helps to identify people, make sure they're in the right area." (Tr. 1378) As discussed above, the shirts that are Team Wear Compliant are not unique to General Assembly. A person wearing a plain black shirt, or even a Tesla Team Wear shirt, could work in any part of the plant, not just General Assembly. Penera seems to imply that each department has its own specific shirt, but that is simply not the case. The more justifications Tesla offered, the weaker all of them proved to be.

In sum, Tesla has not met its burden of showing that its Team Wear policy is "narrowly tailored to the special circumstances justifying maintenance of the rule." Tesla produced no evidence showing the UAW T-shirts cause damage to the vehicles; in fact, the undisputed record shows they do not cause any damage whatsoever. Tesla also did not show how the UAW shirt differed enough from Team Wear to prevent effective visual management by management. To the extent Tesla's witnesses characterized Team Wear as a special uniform, which would allow instant confirmation that an employee was part of General Assembly, the record simply does not support this claim. Finally, the UAW shirts raised no valid safety concerns, and Tesla did not even try to present evidence to the contrary.

4. The Timing of Tesla's Enforcement of the Team Wear Policy Indicates Its Purpose Was to Unlawfully Restrict Protected Activity

Motivation is irrelevant to demonstrate an 8(a)(1) violation when the maintenance and application of a policy restricts protected activity on its face, as in the case here. Even a rule promulgated for neutral reasons can be unlawful if it interferes with employees' Section 7 rights. However, the employer's motivation for adopting a policy is relevant in assessing the genuineness of any proffered special circumstance used to justify restrictions on protected activity.

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[59] Martin cited "safety" as a reason for Team Wear as well, but it appears he was referring to safety gear such as "safety shoes" and "safety glasses, bump caps."

The promulgation of a uniform policy close in time to the appearance of union insignia's provides evidence of an unlawful motive for the policy. *See North Hills Office Services*, 346 NLRB 1099 fn. 6 (2006); *Advancepierre Foods, Inc.*, *supra* at fn 4 (2018) In *North Hills*, the Board found a Section 8(a)(1) violation where the employer's uniform rule followed an unlawful directive to employees to remove their union t-shirts.

Here, the timing of the implementation of Tesla's "Team Wear" policy strongly indicates that it was adopted in response to the Union's campaign. While a loose Team Wear policy existed as far back as 2016, Tesla did not start strict enforcement of the policy until August 10, 2017, the same day that employees handed out UAW T-shirts in the Fremont facility parking lot. Jones, Cotton, and Henry all testified that Tesla permitted employees to wear non-Tesla shirts, up until August 10, 2017. And while Tesla's evidence demonstrates a concern over mutilation caused by clothing beginning in June 2017, there is no evidence that Tesla enforced a "no-shirts-with-insignias-except-Tesla-insignias" rule until the Union started distributing its own T-shirts.

That changed dramatically on August 10, 2017. On that morning, Tesla employees, including Henry, handed out UAW T-shirts in the parking lot. Then, at an 8:00 a.m. daily morning meeting, Martin instructed his subordinates, including Supervisor Tope Ogunnyi, to begin conducting daily scrutiny of employees to ensure strict compliance with the Team Wear rules. (Tr. 2546, 2549-2550) Specifically, Ogunnyi testified:

> Q: You mentioned Kyle Martin was your supervisor in August of 2017; is that right?
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> A: My manager, yes.
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> Q: Your manager, yeah. And in August he instructed you to check employees for teamwear compliance; that's right?
>
> A: Yes.
>
> Q: And that's when you started doing this daily Team Wear check to ensure compliance?
>
> A: After that, yes.

(Tr. 2546)

> Q: And was that day, the one that you're talking about, the day that Martin had given you instructions to start, you know, start this process of walking the line [] and reporting? [] The day that you're remembering all these people, [] was that the

beginning of this process where you were going to go out and tell people, "This is it, you've got to comply, I'll give you 24 hours to do it?"

A: That day, yes.

(Tr. 2549-50) Martin did not dispute Ogunnyi's testimony regarding August 10, 2017.

Later that same day, Ogunnyi sent an email with the subject "Team wear follow-up" to Martin, stating "I spoke to the following associates about team wear compliance and the expectation *going forward.*" (GCX 73; emphasis added) Martin then responded, "How many had UAW shirts?" thus confirming the purpose of the new stricter enforcement of Team Wear. Jones and Cotton also testified that Supervisor Ogunniyi, at a meeting with 25 to 30 Tesla employees sometime in August, stated employees were now required to wear black Tesla shirts and black Tesla pants and would be sent home if they did not. (Tr. 297-98, 330)

This mountain of evidence confirms that Tesla did not begin to enforce a "no-shirts-with-insignias-except-Tesla-insignias" rule at the same time it became concerned about mutilation in June 2017. Instead, it began enforcing a no-shirts-with-insignias-except-Tesla-insignias rule when employees began wearing UAW shirts in August 2017. This evidence dispels any possible argument that Tesla had a genuine concern regarding mutilation, visual management, or safety when it enforced its no-shirts-with-insignias-except-Tesla-insignias rule. Tesla's actions violated Section 8(a)(1)

5. Tesla Threatened an Employee for Wearing a UAW Hat in Violation of Section 8(a)(1) [SAC ¶ 7(w)]

On September 8, 2017, at Tesla's facility in Sparks, Nevada, Dave Teston, the Associate Manager of Manufacturing at the Sparks facility, held a private meeting with Tesla employee Will Locklear, a training coordinator, during which Locklear wore a UAW hat. Teston "asked Locklear if he (Locklear) thought this was professional to have this hat in a training coordinator role" and whether it was "the professional thing to do (referring to wearing the Union hat to work.)" In a subsequent email to a superior, Teston said he also asked Locklear "if he felt that it was sending the wrong message." Locklear did not wear his hat the next day.

Teston's pointed questions to Locklear violate Section 8(a)(1). *See Farr Co.,* 304 NLRB 203, 213 (1991) (supervisor's statement to an employee that wearing a union insignia on his hard

hat suggested he had an "attitude problem" violated Section 8(a)(1)). They not only were intended to discourage Locklear from wearing a UAW hat, but implied that supporting the union was unprofessional and could hinder his future evaluations, opportunity for promotion, or even tenure as a training coordinator. The fact that Teston, Locklear's direct supervisor, made these comments to Locklear during a private meeting only increased the coercive effect.

6. Tesla Threatened an Employee for Wearing a UAW Sticker in Violation of Section 8(a)(1) [SAC ¶ 7(r)]

In the Spring of 2017, Tesla violated the Act when Camat warned Vazquez that he could face negative consequences if he continued wearing a union sticker at the Fremont facility. A supervisor's statement merely implying that displaying pro-union sentiments will negatively affect an employee's standing with the company violates section 8(a)(1) of the Act. *Ichikoh Manufacturing, Inc.*, 312 NLRB 1022 (1993) (supervisor's remark "if it was up to him, he would take off the button" unlawful).

I. TESLA TERMINATED ORTIZ FOR HIS CONCERTED PROTECTED ACTIVITIES IN VIOLATION OF SECTION 8(a)(3) [SAC ¶ 8]

1. Ortiz Was Engaged in Protected Activity When He Criticized Other Employees For Taking Tesla's Side Before the California Legislature

Section 7's "mutual aid or protection" clause guarantees "the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). An employee's activity is "concerted" if the employee "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*). Protected activity can take many forms, including testifying on behalf of employees before legislative bodies concerning workplace issues. *See, e.g., Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1385 (9th Cir.1976).

Ortiz and Moran were engaged in protected concerted activity when they went to Sacramento in August 2017 to campaign for greater legislative oversight of the way that Tesla